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No. 85-946

In The
Supreme Court of the United States
October Term, 1985

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KERR-McGEE CORPORATION,
a Delaware Corporation, and
KERR-McGEE NUCLEAR CORPORATION,
a Delaware Corporation,

Petitioners,

v.

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, deceased,

Respondent.

—o—

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the trial court's rulings admitting evidence of prior misconduct by Kerr-McGee for purposes of showing causation and intent, for purposes of punitive damages, so violates Rule 404(b), Federal Rules of Evidence, and "principles of due process" as to preclude even a new trial on punitive damages as ordered below.

2. Whether the Tenth Circuit's Denial of Kerr-McGee's Petition for Rehearing in which it first requested certification to the Oklahoma Supreme Court of two questions of state law the circuit had decided against it in this diversity action requires overturning the decision below and an order mandating certification rather than the retrial ordered by the circuit.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondent Bill M. Silkwood, Administrator of the Estate of Karen G. Silkwood, deceased, hereby submits the following Brief in Opposition to the Petition for a Writ of Certiorari filed by Petitioners Kerr-McGee Corporation and Kerr-McGee Nuclear Corporation.[1]

[1]The Petitioners are referred to jointly as "KM". References to the record are to the Joint Appendix from the Tenth

(Continued on following page)

STATEMENT OF THE CASE

In its Statement of the Case, KM repeats the same argument-laced recitation it has utilized before to portray itself as the faultless victim of a succession of inequitable, baseless decrees. While Respondent has addressed this characterization before in this Court (J. S.; R. Br. and R. Rep. Br.), an abundance of caution compels Respondent to correct the more egregious errors contained in KM's recitation.

1. KM begins by again insinuating, as it previously did to the jury, the Tenth Circuit and this Court, that Silkwood contaminated herself. We have previously refuted this baseless accusation both to the Circuit, and to this Court, R. Br. 3, n.5. The jury expressly found that Silkwood was not to blame, 1 JA 202. Both the trial court (App. D, 172a-73a) and the Circuit (App. C, 98a) rejected KM's argument that this finding was contrary to the evidence.

2. KM uses this already rejected "circumstantial evidence" of Silkwood's guilt in the contamination of her apartment to buttress its untrue claim that there was a total lack of evidence that "any misconduct by Kerr-McGee caused Silkwood's urine sample to be spiked with

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Circuit by [volume] J.A. [page] or Transcript (TR). "App" refers to the Appendix accompanying KM's Petition here. KM's Brief to the Circuit is referred to as "KM App Br;". Its Remand Brief is "KM Rem. Br.". Respondent's Remand Brief, "R. Rem. Br". In the prior appeal here Respondent's Jurisdictional Statement is "J.S.;" KM's Motion to Dismiss or Affirm is "KM Motion;" KM's Brief is "KM Br;" Our Brief is "R. Br."; our Reply Brief is "R. Rep. Br.". KM's Petition for a Writ of Certiorari is "KM Pet."

plutonium.", quoting out of context the statement by Respondent's counsel that "I don't know how Silkwood got contaminated . . ." (KM Pet. 4)

This attempt to turn counsel's comments into an admission that there was no evidence of KM misconduct toward Silkwood manifests KM's continued confusion over the fundamental elements of this (or any) negligence case.

As it has repeatedly done, KM confuses duty, breach of duty, and proximate cause and has advanced its version of the facts and arguments in such a way as to exacerbate this misconception. This tangled web requires a brief recapitulation of the operative facts and legal theories on which this case has been litigated during the last nine years.

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A. STANDARD OF CARE FOR NEGLIGENCE

Because KM's activities were abnormally dangerous,[2] its duty was to use the utmost due care—every known precaution must be taken—so as to not injure others. (Instr. 10, App. D, 192a).

KM's duty to Silkwood was to use utmost due care to prevent the escape or removal of plutonium from the facility and the consequent foreseeable risk of injury to persons or property. In the event that plutonium got out, KM's duty was to effectively detect, evaluate, limit

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[2]After the close of evidence, the trial judge determined that Respondent had established, as a matter of law, that KM was engaged in an abnormally dangerous activity and so instructed the jury (Instr. 7, App. D, 190a).

the scope of any off-site contamination and remedy any damages. (R. App. Br. 58).

B. BREACH OF DUTY

As the jury found, the contamination of Silkwood's apartment was the product of KM's breach of its containment and response duties. The evidence presented showed deficient physical security and inventory control, a work force inadequately trained as to the hazards of plutonium and proper handling procedures and an unqualified management, along with sub-standard radiation detection and response procedures. This was evidence of contemporaneous, directly-relevant conduct, not irrelevant "other acts," as KM claims.

C. CAUSATION

KM persists in urging a mechanical theory of legal causation despite its rejection by trial and appellate courts. As the jury was instructed, causation is a measure of foreseeability. The jury specifically found that KM's negligence proximately caused the Silkwood contamination. (App. D, 217a).[3]

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[3]The court of appeals found causation established for strict liability. App. C, 111a. Also, the greater the risk created by an activity, the greater the scope of foreseeable consequences. (See R. App. Br. 90-93). Because of the abnormal risk created by KM's activities, the legal causation standards are identical for strict liability and utmost due care negligence. R. Rem. Br. 4-7.

D. INJURY

Undisputed evidence established that virtually all of Silkwood's personal property was confiscated and placed in barrels for disposal.[4] Its stipulated value was $5,000.

With these principles in mind, it is patent that what Respondent's counsel acknowledged was that he chose not to explain exactly *how* the plutonium that contaminated Silkwood's apartment got there, not that he was ignorant of KM's misconduct which breached its containment and response duties. He did not concede an absence of evidence of duty, breach, or causation, and none of these elements requires the "when, where, and how" showing as KM would require them.

E. PUNITIVE DAMAGES

1. KM's CONDUCT

Both the trial and appellate court correctly interpreted Oklahoma law as authorizing an award of punitive damages upon the evidence presented (Instr. No. 19, App. D, 204a; App. A, 6a).

The focus of punitive damages is on the reckless state of mind that endangers the health and safety of the public[5] and, in this case, accompanied the acts of KM that

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[4]While KM seeks to minimize the amount of plutonium detected in Karen Silkwood's apartment ("a small amount" KM Pet., 3), this was characterized by Respondent's expert witnesses as "an enormous amount on a biological basis". Tr. 800 which required the virtual dismantling of Silkwood's apartment. Defendant's Exhibit 27,R. v. 18). Expressed in its usual units of measurement this amount represented 300 million picograms.

[5]Respondent discussed this distinctive feature of punitive damages in the prior appeal. R. Br. 43-45.

alloowed the removal of plutonium from its facility on one hand, and its grossly inadequate response to the discovery of off-site contamination on the other.[6] These acts are measured against KM's utmost due care duty to take every known precaution. Accordingly, the jury was entitled to examine how closely KM's conduct approached this high standard.

To meet its duty of care, KM was required to assure containment of plutonium by its plant design, physical security systems, accountability and inventory, hiring practices, worker training and management. However, actual performance in each of these areas *at the time of the contamination of Silkwood's apartment* was disturbingly deficient. These deficiencies coalesced in the Silkwood contamination and KM's response to this event likewise fell so far short of its required legal duty that punitive damages were fully justified.[7]

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[6]Evidence of KM's misconduct directed at Silkwood has been exhaustively discussed before. It is impossible to reproduce the entire analysis herein.

[7]For example, at the time of the apartment contamination, KM had in place a security system which employed a special nuclear material detector with design limits of .5 gram—enough plutonium to give 38 million Americans the lifetime lung dose (II JA 377-379, 1492-93). Petitioner also failed to adopt other security measures authorized by the NRC (e.g. physical searches, closed-circuit television, etc. Tr. 8018-9). This court acknowledged that KM violated NRC inventory difference limits (App. B, 43a, n.4). Just weeks before the contamination of Silkwood's apartment, the NRC again shut down KM's plant because it violated limits—30,250 grams (66.51 lbs)—set for inventory difference. KM had long been in violation of its license by failing to actually measure the 18,700 grams KM attributed to "holdup".

Additionally, Respondent submitted significant evidence of evil motive, hostility and actual malice directed at Silkwood by KM.[8]

2. CAUSATION

As with negligence, causation for punitive damages is foreseeability—whether it was reasonably foreseeable that the conduct which constitutes reckless disregard or conscious indifference would result in the type of property damage suffered. The court of appeals affirmed the jury's finding of proximate cause and the trial court's overruling of KM's post-trial motions. (App. A, 7a-8a).

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REASONS FOR DENYING THE WRIT

I. NEITHER THE FEDERAL RULES OF EVIDENCE NOR DUE PROCESS PRINCIPLES JUSTIFY OR REQUIRE REVERSAL OF THE JUDGMENT BELOW.

Although there was ample evidence presented of KM's reckless disregard and conscious indifference *at the time of the contamination*,[9] KM persists in asserting that no

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[8]See R. App. Br. 72-73.

[9]"Current misconduct" can certainly consist of "past misconduct" continued to the present that results in a current injury. For example, Respondent established that KM's Chief of Health Physics had his degree in poultry husbandry. (IV JA 1315) While hiring him in the absence of qualifications certainly constituted past misconduct, it was his lack of education that led to KM's astonishing inability to understand what was happening over the November 5th, 6th and 7th contaminations. The same points may be made for physical security, plant design, worker training, inventory and accountability procedures, management, etc. We demonstrated that these prior *choices* resulted in the Silkwood contamination. (R. Rem. Br. 23-29)

such evidence exists and that the jury, trial judge, and court of appeals must have relied solely upon "other acts" in violation of Rule 404(b), Federal Rules of Evidence, and purported Due Process principles espoused by KM.

A. FEDERAL RULES OF EVIDENCE

An evidentiary ruling by a trial court affirmed by an appellate court is not ordinarily considered a worthy basis for granting *certiorari*. Moreover, the court of appeals properly considered evidence of other acts under Rule 404(b) since Oklahoma law allows evidence of prior acts to establish intent or motive for purposes of punitive damages. *Kurn v. Radencic*, 141 P.2d 580, 582 (Ok. 1943).[10]

The court of appeals also quite properly considered this evidence for the issue of causation.[11] See e.g. *Ramos v. Liberty Mutual Insurance Company*, 655 F.2d 334, 338-9 (5th Cir. 1980).

Rather than representing a radical divergence from the interpretation of Rule 404(b) portrayed by KM, the court of appeals utilized two widely-recognized exceptions.

KM's argument that *certiorari* is required to clarify the "considerable confusion among the lower courts about their application [of Rule 404(b)] to specific cases", under the complex facts and legal issues presented by this

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[10]See *Averitt v. Southland Motor Inn of Oklahoma*, 720 F.2d 1178, 1181-82 (10th Cir. 1983) and cases cited in R. App. Br. 67-68. The evidence of other acts is admissible for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Rule 404(b).

[11]See App. A. 8a: "that such negligence did indeed cause the injury."

case, is a contrivance. Moreover, KM's claim of confusion is both speculative and inapplicable to this case—where the court below properly interpreted and applied Rule 404(b). Granting *certiorari* in such a case of a proper application to clarify confusion among other courts (if it does exist) is wholly unjustified. Indeed, its complexity makes this case an unlikely candidate to instruct the lower courts on the vagaries of the exercise of discretion under Rule 404(b). Adoption of such a "confusion" standard by the court would be plainly inconsistent with the court's resistance to serving as a second appellate court and with the role currently envisioned for the management of the court's caseload.

B. DUE PROCESS

KM asserts that the admission of prior act evidence was so prejudicial as to violate due process since the punitive damages awarded were based solely on those prior acts. Since evidence of "current misconduct" and direct malice toward Silkwood abounded in the record, the factual predicate required for this argument is lacking. Also, since the court of appeals properly considered evidence of "past misconduct" for recognized purposes (i.e. intent and causation), KM's attempt to couch this case in due process terms is completely untenable.

In KM's cited case, *Foster v. Barbour*, 613 F.2d 59 (4th Cir. 1980), the prosecutor repeatedly cross-examined the Defendant over "crimes for which he was neither tried nor convicted" utilizing a technique which was both unfair and a violation of a state evidence rule.[12]

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[12]The prosecutor kept leafing through a "sheaf of official looking papers that he held while interrogating the defendant about prior convictions." 613 F.2d at 60 n.1.

What made Foster's trial so unfair as to violate due process was the combination of the prosecutor's tactic with the factual context of the trial—a swearing match between Foster and his co-defendant where "veracity played a critical role". 613 F.2d at 60. That criminal case does not justify *certiorari* here. This case involves neither of KM's predicates for due process violations—improper and highly prejudicial introduction of prior acts evidence and a total absence of current misconduct upon which to base a punitive damage award.[13] KM has received its day in court and is about to receive yet another day at the retrial of this case.

There is simply no due process violation upon which review of the decision below would be justified.

II. THE FACT THAT THE COURT OF APPEALS DID NOT CERTIFY QUESTIONS TO THE OKLAHOMA SUPREME COURT AS REQUESTED IN KERR-McGEE'S PETITION FOR REHEARING DOES NOT JUSTIFY CERTIORARI REVIEW BY THIS COURT OR FURTHER DELAY OF THE NEW TRIAL ORDERED BY THE CIRCUIT.

KM asks this Court to hold that it was reversible error for the Circuit to have decided, in this diversity action, two issues of Oklahoma law rather than certifying them to the Oklahoma Supreme Court. Given the circumstances, such a holding would be unprecedented, an open

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[13]In passing, KM speculates that a higher standard of proof ("clear and convincing") is perhaps constitutionally required in punitive damages cases. (KM Pet. 12 n. 12) Other than a single law-review article, none of KM's citations have interpreted punitive damages as constitutionally requiring a higher standard of proof.

invitation for similar *certiorari* petitions and in disregard of the discretion, the need and the duty of the federal appellate courts to decide questions of state law in diversity cases.

The course urged by KM is particularly inappropriate in this case when the procedural context, the lateness of the certification request and the actual determinations of the Circuit, and the state of the law on those issues, are considered.

A. THE REVIEW SOUGHT IS INAPPROPRIATE GIVEN ITS PROCEDURAL CONTEXT

In its brief on remand from this Court, KM argued that the $10,000,000 jury verdict should be reversed and judgment NOV should be entered. Respondent urged that the jury's verdict should be affirmed *in toto*. The Circuit denied judgment NOV, but reversed the jury's verdict and remanded for a new trial on the punitive damages issues upon the grounds that the jury's determination of the amount of punitives was potentially tainted by its consideration of the physical injuries to Silkwood which the Circuit had previously found to be work-related and uncompensable.

KM asked the Circuit to decide the questions of Oklahoma law at issue here. It did not request certification to the Oklahoma Supreme Court of them or any other questions of law in either its initial remand brief or reply brief. KM first requested certification *after* the Circuit had ruled against it on these issues, in its petition for rehearing. Respondent also sought rehearing. The Circuit denied

rehearing without an opinion. It is that ruling which KM now asks this Court to review.

The ruling by a federal appellate court on a petition for rehearing is a decision on whether to re-decide, not a decision on the merits. It is hard to see how a denial of rehearing can afford a basis for *certiorari* when there had been no request for certification *before* the decision on the merits was rendered. Respondent could find no case where this Court has ever reviewed the discretionary judgment of whether to certify questions to the state courts where that was first sought after a decision on the merits.

Were the Court to grant *certiorari* to review the propriety of the Circuit's denial of certification, it would be an invitation to greatly increased numbers of petitions for *certiorari* based upon this same procedural sequence. Enlargement of this Court's already overburdened caseload would be inevitable.

B. KERR McGEE'S ARGUMENTS ARE PREMISED UPON DISTORTED DEPICTIONS OF WHAT THE CIRCUIT ACTUALLY HELD

In an attempt to depict the Circuit's unwillingness to grant its request for certification to the Oklahomo Supreme Court of two questions of law resolved against it as reversible error, KM has mischaracterized what the Circuit actually held, as well as the degree to which the pertinent law is unsettled.

KM claims that two holdings should have been certified (KM Pet.14). The language of these "holdings" is that of KM, not the Circuit, and there are no references to any parts of the Circuit's opinion where these "hold-

ings" are supposedly expressed. They are mischaracterizations.

1. Punitive Damages And Worker's Compensation

The Circuit never held that it would allow any "action for punitive damages", in part because there is no such separate action under Oklahoma law. See, e.g. *Gilbreath v. Phillips Petroleum Co.*, 526 F.Supp. 657 (N.D. Ok. 1980).

Punitive damages are recoverable only as an adjunct to actual damages for personal injury, property damage or other invasion of non-contractual personal or property rights, and only if the wrong inflicted has been accompanied by oppression, fraud or malice, actual or presumed. Title 23 Ok. Stat. Sec. 9. Nor did the Circuit hold that punitive damages are allowable in *any* case of property damage in connection with a job-related injury, KM's attempt at a "parade of the horribles."

Before a jury is allowed to consider imposition of punitive damages, plaintiff must prove actual damages and must have presented a *prima facie* showing of fraud, malice or willful and wanton behavior upon which a punitive award would be justified. It is reversible error for a trial court to refuse to submit punitive damages to the jury once the legal requisites have been established. *State ex rel Pollution, etc. v. Kerr-McGee Corp.*, 619 P.2d 858 (Ok. 1980). It is also well settled, under Oklahoma law, that punitive damages are recoverable in an action for damage to property. *Garland Coal v. Few*, 267 F.2d 785 (10th Cir. 1959).

Against this legal backdrop, the only novelty to the question of law facing the Circuit was whether the ordinary right to recover actual and punitive damages was unavailable for the damage to Silkwood's property in her apartment, away from the workplace, because it is precluded by the "exclusivity clause" of the Oklahoma Workers Compensation Act, Tit. 85 Ok. Stat. Sec. 12.

The exclusivity clause states that the liability prescribed for "disability or death" resulting from an "accidental personal injury" sustained by an employee is in place of all other liability under the common law or statute. As the Circuit held, it does not provide compensation for damage to a worker's property and certainly not for property damage away from the workplace. (App. C., 108a).

The Act has never been construed as providing a mechanism for recovery of property damage; it contains no language authorizing payment of property damage claims. There is not a single case holding, stating in dicta or implying that the Act operates as an abrogation of the common law right of recovery for property damage.

Since the Act provides no remedy for this wrong, there is no basis in fact, law, or policy for denying to Silkwood or her estate the recovery rights available to others. The question is "novel" only because it is so unmeritorious.

2. Punitive Damages And Substantial Compliance

KM's depiction of the substantial compliance "holding" is similarly misleading, and an unwarranted basis for review by this Court, for a variety of reasons.

First, although KM persistently asserts that it *was* in substantial compliance with all applicable regulations,[14] there was contrary evidence.[15] The issue was for the jury,[16] and it found against KM on this point.[17] Thus, the question as framed by KM does not reflect the facts or determinations of this case and could not properly be submitted to Oklahoma's state courts in that form.

A second distortion in KM's presentation is its effort to exaggerate the novelty of the issue of substantial compliance as a defense to punitives and to contrive a putative conflict in the circuits which might justify a grant of *certiorari*.

In conformity with the prevailing law throughout the country, Oklahoma has long recognized that "substantial" compliance with agency regulations is not a defense to negligence, *Transport Indemnity Co. v. Page*, 406 P.2d

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[14]Although it was repeatedly asked by the trial judge to cite the federal regulations which it contended to fully cover its common law duties of care, KM was never able to do so. See App. D., at 165(a).

[15]This Court's previous decision cited some of the record evidence of non-compliance, 464 U.S. at 242. In addition to the evidence cited by the Court, there was also evidence that Silkwood's exposure violated allowable exposure standards for both workers and the general public. See e.g. TR 1584, 1638, 1648, 1737 (test. of Dr. Karl Morgan); TR 9401 (test. of Dr. George Voelz, KM's expert).

[16]KM conceded that the AEC Report was not the absolute arbiter of its alleged substantial compliance—that issue was for the jury. See TR 10,224 LL 15-17; TR 10,231 LL 3-5.

[17]After considering the competing evidence and upon proper instructions of the standards for punitives, the jury awarded $10 million punitives against KM. By the accepted rules of appellate review, KM cannot now assert its claimed substantial compliance as an established fact.

980 (Ok. 1965).[18] Since even full compliance does not *ipso facto* show due care, it follows that substantial compliance with minimum standards (even if proven) may be so far below the care required for dangerous activities that a finding of gross negligence or reckless disregard is justified.

KM suggests that *Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1107 (7th Cir. 1976) held that compliance with applicable regulations bars punitives and is thus in conflict with *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 733-35 (Minn.), *cert. den.* 449 U.S. 921 (1980). Actually, *Harrison* simply held that the evidence was insufficient to show malice on the defendant's part: "On balance, we do not find grounds for punitive damages," 528 F.2d, at 1125-26.

The holding in *Gryc*, *supra*, that compliance does not preclude punitives, was consistent with the conclusion reached in numerous other cases. *See e.g., Dorsey v. Honda Motor Co.*, 655 F.2d 650, 686 (5th Cir. 1982), *cert. den.*, 103 S.Ct. 177 (1982); *In re Paris Aircrash*, 427 F. Supp. 701 (C.D. Cal. 1977).

A third, more fundamental, flaw is KM's disregard of the fact that this Court has already held that punitives may be imposed *in this case* despite KM's claimed substantial compliance.

When first reviewed by this Court, KM asserted, as it does here, that it "was in compliance with federal regulations as they pertained to the Silkwood incident." KM Br. at 5. Despite this contention, and the basic precept that

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[18]See also: OKLAHOMA UNIFORM JURY INSTRUCTIONS CIVIL, 9.11

the Court decides Constitutional issues only as a last resort, the Court squarely held that the award of punitive damages *in this case* was not preempted. It explicitly recognized that punitives could be imposed under state law by a stricter standard of liability than that imposed at the federal level, 464 U.S. at 256-257, and found that there was no irreconcilable conflict between the federal and state standards "in the circumstances of this case." 464 U.S., at 256.

It is also clear, as the Circuit noted, that the dissents of both Justice Blackmun and Justice Powell interpreted the Court's decision as having held that punitive damages could be imposed even if KM was in compliance with NRC regulations. See App A, 10a.

Given that holding, KM's effort to brand the Tenth Circuit's denial of its post-decision certification request as reversible error is untenable.

C. REVIEW BY THIS COURT OF THE TENTH CIRCUIT'S UNWILLINGNESS TO GRANT KERR-McGEE'S REQUEST FOR CERTIFICATION IS UNWARRANTED

Since *Erie R.R. v. Tomkins*, 304 U.S. 64 (1938), federal trial and appellate courts have had the duty to decide many thousands of unsettled state law questions in diversity cases.

This Court has recognized that the difficulty of interpreting and applying state law does not, by itself, justify a federal court's refusal to exercise its jurisdiction and decide state law issues. See e.g., *Meredith v. Winter Haven*, 320 U.S. 228, 234-35 (1943).

In all the federal court decisions of state law questions in diversity cases there has never been a single one in which this Court has permitted a litigant to do what KM attempts here.

While state certification procedures are available and their use may be appropriate or desirable in many cases, this Court has recognized that whether to refer issues to the state courts must be left to the discretion of the inferior courts.

As was noted in one of the cases cited by Petitioners, *Lehman Brothers v. Schein*:

> "... in a purely diversity case such as this one, the use of such a procedure is more a question of the considerable discretion of the federal court in going about the decision-making process than it is a question of a choice trenching upon the fundamentals of our federal-state jurisprudence."
>
> 416 U.S. 386, 394 (J. Rehnquist, concurring).

. . . .

As Justice Rehnquist noted, the decision of the Court of Appeals was vacated in *Schein* because the court was for the first time expressing its views as to the use of certification procedures by the federal courts. Id. Since *Schein*, respondent could not find a single case in which this Court has reversed an appellate court's discretionary decision to decide, rather than certify, state law issues.

None of the cases cited by KM represents a departure from this court's recognition of the wide discretion possessed by the lower courts. The comments of Justice O'Connor in her concurring opinion in *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. 2794, 2805 (1985), cited by

KM, are in no way inconsistent, when considered in context.

Brockett involved a facial constitutional challenge to a Washington state moral nuisance law four days after its enactment, before any interpretation of the statute by the state courts. The Court held that the Ninth Circuit's invalidation of the entire statute was erroneous and that partial invalidation was the proper decision in light of the statute's severability clause.

In her concurring opinion, in which Justice Rehnquist joined, Justice O'Connor observed that it would have been preferable to have this new statute first interpreted by the state court rather than the federal court—an understandable course that would not have been prejudicial to the litigants or to the courts and would have been consistent with the moving party's request for a judicial declaration of the constitutionality of the law in advance of any prosecutions under it.

In this case, by contrast, the request for a judicial declaration of what the state law is was made nine years into the litigation, after the questions had been decided on their merits on appeal and the relevant legal issues were not nearly as novel, unsettled or transcendant as KM suggests.

Under these circumstances, all relevant to the exercise of the Circuit's discretion, the denial of KM's request for certification when first made in its petition for rehearing cannot be considered an abuse of discretion or reversible error.

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III. CONCLUSION

For all of the reasons noted above, KM's Petition for *Certiorari* should be denied.

Respectfully Submitted,

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